No. .....

Supreme Court of the United States

October Term, 1972

ANTHONY JOSEPH RUSSO, JR. and DANIEL ELLSBERG,

Petitioners,

vs.

WM. MATTHEW BYRNE, JR., Judge of the United States District Court for the Central District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony Joseph Russo, Jr. and Daniel Ellsberg petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-3a) and the oral opinion of the district court (App. B, *infra*, pp. 4a-6a) have not been reported. The opinion of Mr. Justice Douglas granting a stay of the trial pending the petition for certiorari (App. C, *infra*, pp. 7a-9a) has not yet been reported.

Jurisdiction

On July 27, 1972 the Court of Appeals denied a petition for a writ of mandamus seeking to compel the respondent district judge to comply with the procedures laid down in *Alderman* v. *United States,* 394 U.S. 165, 182, *i.e.,* to determine the legality of the admitted electronic surveillance of the conversations of petitioners' attorneys and consultants and, if illegal, to disclose the surveillance logs and to conduct an adversary proceeding to determine relevance and taint. The judgment of the Court of Appeals, consisting of its opinion, is set forth in App. A, *infra,* pp. 1a-3c. On July 29, 1972, Mr. Justice Douglas stayed the trial herein pending the filing of this petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the determination of the relevance of the wiretapped conversations of a defendant's attorneys and agents in a criminal case requires an adversary hearing under the Fourth, Fifth and Sixth Amendments to the Constitution.

2. Whether a district court's refusal to conduct such an adversary proceeding also violates the mandate of Congress as expressed in the Communications Act of 1934, the Omnibus Crime Control and Safe Streets Act of 1968, and the Organized Crime Control Act of 1970.

3. Whether a warrantless "foreign intelligence" interception is lawful, and, if so, whether the use of its fruits in criminal prosecutions violates the First, Fourth, Fifth and Sixth Amendments to the Constitution.

Statutes Involved

The constitutional provisions involved are the First, Fourth, Fifth and Sixth Amendments to the Constitution. The statutes involved are the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605; the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212-218, 222-3, 18 U.S.C. 2510-2520, and the Organized Crime Control Act of 1970, 84 Stat. 935, 18 U.S.C. 3504. The pertinent sections of the statutes are reproduced in Appendix "D", *infra,* pp. 10a-23a.

Statement of the Case

Petitioners were indicted in the United States District Court for the Central District of California for violations of 18 U.S.C. 371, 641, 793, relating to the multi-volume history of the United States' involvement in Vietnam, generally known as the Pentagon Papers. See *New York Times Co.* v. *United States,* 403 U.S. 713.

On January 24, 1972, during pre-trial proceedings, petitioners moved for discovery of electronic surveillance information with respect to the petitioners, their attorneys and legal consultants. On May 2, 1972 the district court, over government opposition, granted the motion and ordered the government to disclose electronic surveillance of any communications to which the petitioners or "the attorneys for the defendants or any of said attorneys' agents or employees were a party. . ." In lieu of compliance the government, nearly three weeks later, moved for reconsideration of that portion of the court order regarding attorneys and agents. The government's motion was denied by the trial court on June 20, 1972.

Thereafter, defense counsel repeatedly pressed the government in open court for compliance with the court's order of May 2, 1972. On June 30, 1972 the government

filed another motion opposing the district court's order requiring disclosure of surveillance of certain individuals listed by petitioners as attorneys and consultants. That motion also was denied following the petitioners' *in camera* submission respecting the duties of the listed consultants.

On July 3, 6 and 7, 1972, defense counsel again objected to the government's failure to comply with the court's order of May 2nd. On July 7, 1972, the court entered a written order reaffirming its order of May 2, 1972.

On July 10, 1972, the government filed an affidavit denying surveillance of the petitioners; the affidavit had been in its possession for over a month. On the morning of July 21, 1972, the jury was empanelled and sworn. At 4:26 p.m. of that day, after the close of court, the government filed an affidavit denying surveillance of the attorneys and their agents "except as may hereafter be disclosed to the Court *in camera*." But later that afternoon, without notice to the petitioners, the government submitted *in camera* a surveillance log on a member of the defense team. No notice of this submission was given to the petitioners, although it had been the uniform practice of both government and defense counsel on all prior occasions to give notice of *in camera* filings. Defense counsel was first informed of the electronic surveillance by the district judge during argument on July 24, 1972 while defense counsel was objecting that the government's affidavit was so vague that it was impossible to ascertain whether there had been any electronic surveillance.

Petitioners requested the identity of the persons surveilled, the turnover of the logs and an evidentiary hearing on relevance and taint. The district court denied the request, stating that the logs did not reveal any information relevant to the issues in the case (App. B, *infra*, pp. 4a-6a). Neither the government nor the district court disclosed the nature of the surveillance, *i.e.*, national security, foreign intelligence or otherwise.

Petitioners applied to the Court of Appeals for the Ninth Circuit for a writ of mandamus to compel the district judge to comply with this Court's decision in *Alderman* v. *United States, supra,* and secured a stay of the trial pending argument on the writ. The Court of Appeals after argument on the merits assumed *arguendo* "that had the intercepted conversations dealt with the pending prosecutions of these petitioners, *United States* v. *Seale, supra,* would support the order for disclosure sought by petitioners" (App. A, *infra,* p. 2a). It declined to direct discovery because "the District Court has determined that the intercepted conversation had no such relationship" *Ibid.* and it vacated the stay.

On July 28, 1972, Mr. Justice Douglas, sitting as Circuit Justice, heard oral argument upon petitioners' application for a further stay pending the filing of a petition for certiorari. In the course of argument the government stated for the first time that the wiretap was a "foreign intelligence" tap and that it was made, not pursuant to judicial order, but under an undisclosed authorization of the Attorney General. Mr. Justice Douglas granted a stay of the trial pending the filing of this petition on the ground that the application "presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions." *Russo* v. *Byrne,* No. A-150 (Douglas, Circuit Justice, July 29, 1972) (App. C, *infra,* p. 7a). The government's motion to the full Court for a vacation of the stay was denied.

That motion had expressed the Solicitor General's opinion that a jury could not be kept "on leash" indefinitely and that the petitioners could plead double jeopardy to a trial before a new jury. While disagreeing with the Solicitor General's analysis, petitioners subsequently moved the district court for a mistrial and exe-

cuted a formal waiver of any claim to double jeopardy if the motion for a mistrial were granted and the occasion arose for the selection of a new jury.

Reasons for Granting the Writ

1. The decision below conflicts with this Court's decisions requiring, on constitutional grounds, that the determination of the relevance of wiretapped conversations be made in adversary proceedings.

This case followed by less than ninety days this Court's historic affirmance in *United States* v. *United States District Court,* — U.S. —, U.S.L. Week 4761 (June 20, 1972) of the principles laid down in *Alderman* v. *United States,* 394 U.S. 165, and raises questions of comparable concern for the integrity of the judicial process. For the first time in the long history of criminal litigation in this country, two defendants face criminal prosecution, knowing in advance of their trial by way of an admission by the government, that an attorney of record or a defense consultant, during the period of their employment by the defendants, has been overheard through electronic surveillance. The trial court's action foreclosing all further disclosure and consideration of the tap based solely on an *in camera ex parte* determination that the substance of the conversation was irrelevant to the case, action described by a Justice of this Court as "seemingly out of harmony" with the most recently established constitutional principles of this Court, resulted in an unprecedented stay of the proceedings affording petitioners an opportunity to apply to this Court for a review of ". . . a profoundly important constitutional question not squarely decided by the Supreme Court. . . ." *Russo* v. *Byrne, District Judge,* Supreme Court No. A-150, Douglas, Circuit Justice, July 29, 1972 (App. C, *infra,* p. 7a).

Alderman held that the relevance of illegally tapped conversations should not be decided *in camera* and *ex parte* by the trial judge. Rather, the issue of the nexus of the tapped conversation to the case must be litigated in adversary proceedings following disclosure of the logs of the surveillance.

It will be recalled that in *Alderman* the government conceded that all overhearings "arguably relevant" should be tested by adversary proceedings and it contended only that a preliminary determination of arguable relevance should be made by the trial judge *in camera*. But even this position, characterized in the Court's opinion as a "modest proposal", was rejected by the Court because "[t]he task [of determining arguable relevance] is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the government's case" *Alderman* v. *United States*, *supra*, p. 182 (footnote omitted).

Contemporaneous interpretation of *Alderman* has made it equally clear that not all issues relating to electronic surveillance need be decided in adversary proceedings. The determination of the relevance of overheard conversations requires adversary proceedings because confident resolution of the issue requires an intimacy with the facts and personalities of the case which no court possesses without the special knowledge of the parties:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of the telephone, or even the manner of speaking or using words may have special significance to one who knows the facts in an accused's life." *Alderman* v. *United States*, *Ibid.*

By contrast, a more mechanistic judgment may be made by the trial court *in camera;* for example, double-checking the government's voice identifications, *Taglianetti* v. *United*

States, 394 U.S. 316. (On the other hand, the lawfulness of an order authorizing the surveillance may require an adversary proceeding where the legality of the search warrant or the sufficiency of the Attorney General's affidavit is at issue. *Cf. Giardano* v. *United States*, 394 U.S. 310, 319 (Stewart, *J.*, concurring opinion) with *United States* v. *United States District Court, supra* at 4774-4776 (White, J., concurring opinion)).

Thus, the test of *Alderman* is a functional one: choice of the appropriate procedure, adversary or *ex parte in camera,* depends upon the nature of the particular issue, with determinations of relevance, even of "arguable relevance", the prototypical example requiring disclosure and adversary proceedings. *United States* v. *United States District Court, supra.*

In the instant case, notwithstanding the clear mandate of *Alderman,* the trial court examined the content of the logs *in camera* and *ex parte* and ruled that the overheard conversations of a member of the defense camp were not relevant to the case. Based upon such determination, the court reasoned that neither the Fourth nor the Sixth Amendment rights of the petitioners were violated. Hence, it held that they lacked standing to question the legality of the tap and, if illegal, to compel disclosure and suppression. The court below affirmed.

The threat posed by this reasoning to the efficacy of *Alderman* and its progeny should be immediately apparent. An adversary hearing on relevance is the last stage of the procedural course charted by *Alderman*: the trial court is to determine, first, the existence of any surveillance of which the defendant has standing to inquire; second, the legality of such surveillance; and, third, in adversary proceedings, the relevance of such surveillance. By casting the issue of relevance as a problem of standing, the district court has advanced last for first, and has short-circuited all other stages including the adversary determination of relevance.

Moreover, the evaluative function of the trial judge in determining "standing" and thus foreclosing an adversary determination of relevance was identical with that of the trial judge's determination of "arguable relevance" which this Court rejected in *Alderman*. In examining the logs to determine if the attorney's conversations related to this case, the trial court engaged in the same mental process, examined the same qualitative evidence, operated under the same inadequacies, and ran the same impermissible risks.

As the first Justice of the Court to review the record observed: "*Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera* and the trial court ruled against the defendants on the merits and then determined they had no 'standing' to complain." *Russo* v. *Byrne*, App. C, *infra*, p. 8a. Since the issue of standing is congruent to the issue of relevance, the district court should have followed the Seventh Circuit's admonition:

> "Without a fair opportunity to prove standing, the right to the opportunity to show a tainted trial, announced in *Alderman*—is a right without value, for what the Supreme Court in *Alderman* said with respect to the inadequacy of a solely *in camera* inspection with respect to arguable relevance of eavesdropping applies as well to the question of a meaningful opportunity for establishing standing." *United States* v. *Fannon*, 435 F. 2d 364, 367 n.2 (7th Cir. 1970).

This is consistent with this Court's more liberalized approach to standing in recent years. See, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83; *NAACP* v. *Alabama*, 357 U.S. 201; *Barrows* v. *Jackson*, 346 U.S. 249; *Combs* v. *United States*, U.S. , 40 U.S.L. Week 4917 (June 26, 1972). It also follows the Court's practice in appropriate cases of postponing the determination of the threshold issue of standing until there is an opportunity for adequate consideration of the congruent issue of the merits. See, *e.g.*, *Parmelee Transp. Co.* v. *Atchison, T & S.F.R. Co.*, 353 U.S. 971; *Cramp* v. *Board of Public Instruction*, 366 U.S. 934; *In re Groban*, 351 U.S. 903.

More particularly, the relationship between defendant and counsel in a criminal case is one of those "special circumstances" referred to in *Alderman*, *supra* at 174, calling for a broad conception of standing in Fourth Amendment cases. It has been applied in cases where the connection was far more tenuous, see *Jones* v. *United States,* 362 U. S. 257, 261; *United States* v. *Jeffers,* 342 U. S. 48, than the attorney-client relationship whose "confidentiality must continue to receive unceasing protection." *Lanza* v. *New York,* 370 U. S. 139, 144; see *Hickman* v. *Taylor,* 329 U.S. 495. The relationship has been eloquently described in an American Bar Association study:

> "Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct."

American Bar Association Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) p. 146.

The defense lawyer who was the subject of the tap also has an independent standing to raise Fourth, Fifth and Sixth Amendment claims with respect to litigation in which he is under a duty to protect his client's interests as well as his own. See, *e.g., In re Turkeltoub,* 256 F. Supp. 683 (S.D.N.Y. 1966). Knowing that his conversations have been surveilled and may continue to be so, but ignorant of the details, he may well conclude that he cannot offer the effective assistance of counsel required by his retainer, the Canons of Ethics, Nos. 4 and 7, and the Sixth Amendment. The discovery motion in his client's name gives him the only significant opportunity to ascertain the relevant facts, including the nexus between conversation and legal representation, and to decide jointly with his client on the continuance *vel non* of the relationship.

In this context the Court of Appeals' concern for the possible intrusion "upon the protected relationship of some third party" (App. A, *infra,* p. 3a) is misplaced. It is the same argument made by the Solicitor General and overruled by the Court in *Alderman, supra,* at 168, 184. The government, which has already pried into the petitioners' attorneys' affairs, is in no position to contest the joint attorneys'-defendants' request for revelations that may bear upon this case.

Thus, this case involves more than the violation of Fourth Amendment rights against search and seizure which were the subject of the Court's decision in *Alderman, supra.* It is also concerned with the Fifth and Sixth Amendment rights to due process, a fair trial, and the effective assistance of counsel. For the overheard conversation was that of either an attorney of record or a legal consultant to the defense, intercepted since his retention by the defendants during that period of time described by this Court as ". . perhaps the most critical period of the proceedings . . . from the time of arraignment until the beginning of . . . trial, when consultations, thoroughgoing investigation and preparation [are] vitally important. . ." *Powell* v. *Alabama,* 287 U.S. 45, 57.[1]

During the preparatory stage when "privacy is so vital", *In re Turkeltoub, supra,* this Court has erected a virtual constitutional shield around the councils of the

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[1] The effect of this disclosure on the petitioners and their attorneys on the eve of the trial was exacerbated by the inexplicable and unprecedented refusal of the government to disclose the identity of the party overheard and the accompanying failure of the trial court to compel such disclosure, leaving all on the councils of the defense with the anxious knowledge that someone was overheard without knowing precisely whom. See *In re Turkeltoub, supra* at 684 where the court cautions against practices which might have a "slightly chilling impact upon counsel for defendants in criminal cases . . ." and impair the "lawyer's effective representation of his client," citing *Hickman* v. *Taylor,* 329 U.S. at 514-515.

defense, not only to protect the private interests of the accused but also to safeguard the overriding interest of the community in the integrity of the adversary criminal process. *Hickman* v. *Taylor, supra,* at 515; *O'Brien* v. *United States,* 386 U.S. 345; *Black* v. *United States,* 385 U.S. 26; see also *Caldwell* v. *United States,* 205 F. 2d 879 (D.C. Cir. 1953); *Coplon* v. *United States,* 191 F. 2d 749 (D.C. Cir. 1951), *cert. den.* 342 U.S. 926. No surreptitious piercing of the councils of the defense are countenanced, particularly by the "uninvited ear" of government through means of electronic surveillance. See *Katz* v. *United States,* 389 U.S. 347, 352. Thus, even the most innocuous information, such as an overheard conversation between attorney and client respecting travel restrictions in a bail bond, not communicated to the prosecuting attorney, will vitiate the entire trial. *O'Brien* v. *United States, supra.*

The qualitative difference between the information obtained by an overhearing of the defendant as opposed to that of his counsel also contributes to the greater sensitivity demonstrated where the lawyer is overheard. The most delicate considerations of trial strategy and tactics, not traceable to evidentiary leads, may be invaded in such overhearings. As observed by Circuit Judge Coffin, in these instances, the "real nemesis" lies in:

> "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial,* quite apart from hearing affirmative evidence, or leads to evidence." *Taglianetti* v. *United States,* 398 F.2d 558, 570 (1st Cir. 1968), *aff'd* 394 U.S. 316.

The present case which intimately concerns the history of the Indochina War is both one in which international communications are necessary for defense purposes and in which their interception might give substantial benefit to the government.

The foregoing considerations have additional weight because of the effect upon the First Amendment freedoms of belief, speech and association of the electronic surveillance of American citizens, whether lawyers or their clients. The Court has recognized these factors in overruling the government's claims of an inherent executive wiretap power for reasons of national security. *United States* v. *United States District Court*, *supra*, at 40 U.S.L. Week 4766, 4768-9. The same factors give added justification to the petitioners' claim of right to an adversary proceeding in this case where the wiretap is allegedly for "foreign intelligence" purposes.

2. The decision below conflicts with the mandate of Congress as set forth in 18 U.S.C. 2510-2520, 3504 and 47 U.S.C. 605.

The refusal of the courts below to compel discovery and to conduct an adversary hearing appears also to conflict with the provisions of the two recent wiretapping statutes, the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-20; 82 Stat. 212-223) and the Organized Crime Control Act of 1970 (18 U.S.C. 3504; 84 Stat. 922, 935, *infra*), implementing the Communications Act of 1934, (47 U.S.C. 605, 48 Stat. 1103) as interpreted and applied by this Court.

The first of these statutes appears to incorporate the procedures mandated by *Alderman*. See *Gelbard* v. *United States*, — U.S. —, 40 U.S.L. Week 4862 (June 26, 1972); Mr. Justice White concurring in *United States* v. *United States District Court*, *supra*, at 40 U.S.L. Week at 4772.

The second statute gives further protection to a defendant by requiring the government to "affirm or deny" the existence of wiretapping upon the demand of an aggrieved party (18 U.S.C. 3504(a)(1)) such as the petitioners under the trial court's disclosure order.

The government's response in this case, *supra*, page 4, was a deceptive evasion of this statutory duty. In the *United States District Court* case, *supra*, where the government filed an affidavit purporting to set forth the authority for the tap, Mr. Justice White, concurring at p. 4774, concluded that the inadequacy of the Attorney General's affidavit made "the surveillance conducted by the Government in this case . . . illegal . . . under the statute itself . . .". *A fortiori* here where no assertion of authority was revealed to petitioners.

3. The case also presents the important constitutional question expressly left open by this Court as to the lawfulness and effect of wiretapping for "foreign intelligence" purposes.

The case comes to the Court with the government's claim before Mr. Justice Douglas that it involves a "foreign intelligence" tap—a claim not previously made in or, as a consequence of the district court's decision on "standing", adjudicated by the courts below.

A "foreign intelligence" tap is a term whose vagueness the government has admitted previously [2] and in this case (see App. C, *infra*, pp. 7a-8a). In the *United States District Court* case, *supra*, the government described the "distinction" between domestic security and foreign intelligence taps as unsupported "both on the facts of this case and in most (if not all) national security cases within the congressionally defined areas of concern" [3] This Court's decision in that case that warrantless internal security taps violated the Fourth Amendment expressly left the issue open with respect to so-called "foreign intelligence taps" *Supra* at 4769; see also Mr. Justice Stewart's con-

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[2] ". . . the line between domestic activity and foreign intelligence is often blurred, or merged." Govt. Pet. for Cert., p. 8, *United States* v. *United States District Court, supra.*

[3] Brief for the United States, pp. 30-31 (footnote omitted).

curring opinion in *Giordano* v. *United States,* 394 U.S. 310, 314 and cases cited. The question is obviously an important one calling for plenary consideration by this Court.

Such an adjudication is particularly appropriate here because the lower court's failure to make a finding was due to the government's deception, *supra,* p. 4, and to the district court's error in blocking further inquiry by its ruling on "standing". The issue is exclusively one of law which can be presently adjudicated upon the government's claim that the tap is in the field of foreign intelligence—a claim which we have no doubt was made in good faith and by which it will stand. Further, as noted above, this is precisely the kind of case in which preparation by counsel is likely to involve international communications intercepted by the government. Since no foreign intelligence record will ever present more facts than the Attorney General's present claim, this most important issue should now be considered by the Court.

The government's claim of inherent executive power to wiretap and use it in criminal proceedings violates the Constitution in several respects. First, such a claim is contrary to our system of limited governmental powers and to the law-making power as set forth in Article I, § 1 of the Constitution and has been rejected by the Court where important liberties are involved, *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579; *Kent* v. *Dulles,* 357 U.S. 116. Even the government while unsuccessfully insisting upon the right to wiretap without warrant in an internal security case has conceded that "[o]nce that surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment . . ." [4]

Second, even assuming that upon plenary consideration of the issues the Court were to conclude that it was

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[4] Brief for the United States, p. 21 in *United States* v. *United States District Court, supra.*

in no position to control so-called foreign intelligence tapping for reasons of executive privilege, state secrets, or otherwise, that does not foreclose petitioners' objections on constitutional grounds to the use of the wiretapping materials against them in a criminal prosecution. The existence of a power for special emergency purposes does not constitutionally support its exercise or, as here, its extension, in other circumstances. See *Anderson* v. *Dunn, 6 Wheat 204-231.* The distinction, upon statutory grounds, between the power to wiretap and the right to use its fruits is suggested also by Mr. Justice White in his concurring opinion in *United States* v. *United States District Court, supra,* at 4775.

In a strikingly similar case, the government successfully withheld from the defense the results of wiretapping engaged in to combat *foreign* espionage, but at the cost of dismissing the prosecution of a defendant who as here asserted her Sixth Amendment right to confrontation. *Coplon* v. *United States,* 185 F.2d 629, 638, *cert. den. sub. nom., United States* v. *Coplon,* 342 U.S. 920. As Chief Judge Learned Hand said:

> "[t]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense."

This view was adopted by the Court in *Alderman, supra* at 184, two decades later where Mr. Justice White wrote with respect to the Fourth Amendment rights involved: "It may be that the prospect of disclosures will compel the government to dismiss some prosecutions in deference to national security or third party interests."

In short, if wiretapping for intelligence purposes may be engaged in without warrant, consistent with the Fourth Amendment, its additional use for non-intelligence purposes, specifically for criminal prosecutions, is subject to Fourth, Fifth and Sixth Amendment limitations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment and opinion of the court below.

Respectfully submitted,

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August 21, 1972

APPENDIX A

(Opinion and Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

—o—

ANTHONY JOSEPH RUSSO, JR., and DANIEL ELLSBERG,

Petitioners,

against

HON. WILLIAM MATTHEW BYRNE, JR., United States District Judge for the Central District of California,

Respondent.

—o—

On Appeal from the United States District Court for the Central District of California

Before:

MERRILL, KOELSCH and TRASK, Circuit Judges.

Per Curiam:

Petitioners are charged with federal criminal offenses and trial is pending in the Central District of California. In pre-trial proceedings the District Court ordered that the government disclose *in camera* any interception of wire or oral communications to which defendant's attorneys, or employees determined by the court to be bona fide defense consultants, were parties.

Pursuant to that order the government disclosed *in camera* interception of a single telephone call from a place at which the government had installed an instrument of electronic surveillance to one of the attorneys or defense consultants. The court, after *in camera* examination of the disclosure, ruled that defendants were without standing to

request disclosure because the intercepted conversation "was utterly without significance or relation to this case" and could not "conceivably come within the client-attorney privilege." Defendants, as petitioners in these proceedings, then sought a writ of mandamus from this court requiring the respondent District Judge to require the government to disclose the name or names of the person or persons who were subject to the surveillance and the contents of the intercepted communications and to order a pretrial hearing to determine whether the interception was illegal and, if so, to determine whether the interception tainted the prosecution's case.

Relying on *United States* v. *Seale,* ..... F.2d ..... (7 Cir. May 11, 1972), petitioners contend that eavesdropping on an attorney or defense consultant constitutes a sufficiently direct intrusion into the attorney-client relationship to give them standing to complain that their Sixth Amendment right to assistance of counsel may have been disturbed. Relying on *Alderman* v. *United States,* 394 U.S. 165 (1969) they contend that with such standing they are entitled to disclosure and a hearing to determine whether the intercepted conversation taints the prosecution's case.

We assume, *arguendo,* that had the intercepted conversation dealt with the pending prosecutions of these petitioners, *United States* v. *Seale, supra,* would support the order for disclosure sought by petitioners. The difficulty is that the District Court has determined that the intercepted conversation had no such relationship. Petitioners here contend that for reasons of policy it must be presumed to relate to their cases; that when conversations of their attorneys or consultants have been intercepted they have standing *per se to* require disclosure; that the question whether the conversation relates to their cases is not such a question as should be resolved by the court *in camera* but that it should be determined only after disclosure and after they have had the opportunity to be heard upon the question.

Appendix A

We cannot agree. Sixth Amendment rights do not confer standing upon a client to pry into all his attorney's business, whether it relates to his case or not. For these petitioners to have standing it is necessary that the interception intrude upon *their* relationship with their attorney or consultant. It is for the court *in camera* to determine whether such is the case. *Taglianetti* v. *United States*, 394 U.S. 316 (1969).[1]

Writ denied. The stay heretofore granted by this court is vacated.

/s/ Charles M. Merrill

/s/ M. Oliver Koelsch

/s/ Ozell M. Trask
Circuit Judges

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[1] As one reason for application of the rule to the facts of this case we note that to air the intercepted conversation for all to argue about might well intrude upon the protected relationship of some third party.

APPENDIX B

(Oral Opinion of the District Court)

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WM. MATTHEW BYRNE, JR., Judge Presiding

No. 9373-CD-WMB

—o—

UNITED STATES OF AMERICA,

Plaintiff,

against

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,

Defendants.

—o—

The Court:

All right, before I call the jurors in, what I intend to do, I will give my ruling on the electronic surveillance now. I will then call in the jurors that I am going to give the final concluding instructions to. Then we will call all the jurors in and exercise your peremptories.

All right, as far as the motion for the electronic surveillance that was presented yesterday, I find that, in order for the defendants to have standing to challenge the government's surveillance, there must have been surveillance in violation of either the defendants' Fourth Amendment rights against unreasonable searches or in violation of their Sixth Amendment rights to counsel.

Relating back now to the first affidavits that were filed by the government, I find from an examination of the government affidavits of July 8, 1972, and July 10, 1972, that there was no surveillance of the defendants; there

was no surveillance of the premises or premises where they had an expectation of privacy, those listed in the order of July 7, 1972, nor was there any surveillance of any conversation to which either of the defendants were a party.

Therefore, there was no surveillance in violation of the defendants' Fourth Amendment rights.

If the defendants have standing to object to the government's surveillance, it would have to be under the Sixth Amendment right to counsel, and that was the matter that we discussed and argued yesterday.

The government affidavit of July 21, 1972, advises that there has been no electronic surveillance directed at any individual named in the order, any individual lawyer or consultant named in the order; nor has there been any electronic surveillance conducted at any of the places that were named in the order.

The question thus arises on the attorney-client privilege because one of the persons named in the order was a recipient of a communication from an installation under surveillance.

Under the authority of *Giordano* v. *United States* and *Taglianetti* v. *United States,* both Supreme Court cases decided after Alderman, and also on the authority of Kane and Clay, Fifth Circuit cases, it is appropriate for the Court to make an *in camera* inspection to determine standing to challenge government surveillance. The defendants have standing if, and only if, the intercepted communication is within the attorney-client privilege.

I have examined the government's affidavit of July 21, 1972, and I have examined the government's *in camera* filing of the intercepted statement. I find that the statement intercepted on a single date in question regards an event that is utterly without significance or relation in any way to this case. Nothing said in the intercepted com-

munication could conceivably come within the attorney-client privilege.

Therefore, there has been no interception of any communication falling within the attorney-client privilege, and I find that the defendants lack standing to challenge the government surveillance under the Sixth Amendment.

The motion for a pretrial hearing is denied.

Because it may be of some subsequent relevance, in order to make the record complete to give the defendants every benefit should appeal be necessary, I order the government to provide *in camera* an affidavit reciting the authority or authorization of the surveillance by the government on the date specified in the government's *in camera* filing of July 21, 1972, that order again being in compliance with similar orders in the *District Court* case and also in *Giordano* and I believe also in *Taglianetti*.

APPENDIX C

(Opinion of Circuit Justice)

SUPREME COURT OF THE UNITED STATES

No. A-150

—o—

Application for Stay.

ANTHONY JOSEPH RUSSO, JR., and DANIEL ELLSBERG,

Applicants,

WILLIAM MATTHEW BYRNE, JR.,

Judge of the United States District Court for the Central District of California.

—o—

[July 29, 1972]

MR. JUSTICE DOUGLAS, *Circuit Justice.*

The question raised by this application for stay presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions.

The electronic surveillance used by the government was represented to me on oral argument as being in the "foreign" field. No warrant, as required by the Fourth Amendment, and by our decisions, was obtained, only the authorization by the Attorney General. Such authorization was held insufficient in our recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*,—U.S.—(1972). It is argued that that case involved "domestic" surveillance but the Fourth Amendment and our prior decisions, to date at least, draw no distinction between "foreign" and "domes-

tic'' surveillance. Whether such a distinction will eventually be made is for the Court, not for me, to make. Moreover, in light of the casual way in which ''foreign'' as distinguished from ''domestic'' surveillance was used on oral argument it may be that we are dealing only with a question of semantics. Defendants' telephonic communications, it seems, were not tapped, nor were those of their attorney or consultants. But a conversation or several conversations of counsel for defendants were intercepted.

The District Court in an *in camera* proceeding ruled that those conversations were not relevant to any issues in the present trial. The Court of Appeals, as I read its opinion, ruled that the defendants—*i.e.,* petitioners who make this application—have no ''standing'' to raise the question. If, however, the interceptions were ''relevant'' to the trial, it would seem they would have ''standing.''

Therefore it would seem to follow from the reasoning of the Court of Appeals that whether or not there was ''standing'' would turn on the merits. The case, viewed in that posture, would seem to require an adversary hearing on the issue of relevancy. We held, in *Alderman* v. *United States,* 394 U. S. 165, 182 (1968), that the issue of relevancy should not be resolved *in camera,* but in an adversary proceeding. *Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera,* and if the trial court ruled against the defendants on the merits and then determined they had no ''standing'' to complain.

I seriously doubt if the ruling of the Court of Appeals on ''standing'' accurately states the law. In modern times the ''standing'' of persons or parties to raise issues has been greatly liberalized. Our Court has not squarely ruled on the precise issue here involved. But it did rule in *Flast* v. *Cohen,* 392 U. S. 83, 103 (1967), that one who complains of a violation of a First Amendment right has

"standing." On oral argument *Flast* was distinguished from the present one on the ground that under the Fourth Amendment only those whose premises have been invaded or whose conversations have been intercepted have standing to complain of unconsitutional searches and seizures. That contention, however, does not dispose of this case.

The constitutional right earnestly pressed here is the right to counsel guaranteed by the Sixth Amendment. That guarantee obviously involves the right to keep the confidences of the client from the ear of the government, which these days seeks to learn more and more of the affairs of men. The constitutional right of the client of course extends only to his case, not to the other concerns of his attorney. But unless he can be granted "standing" to determine whether his confidences have been disclosed to the powerful electronic ear of the government, the constitutional fences protective of privacy are broken down.

My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits. If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions or questions or transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.

I am exceedingly reluctant to grant a stay where the case in a federal court is barely underway. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so.

If the law under which we live and which controls every federal trial in the land is the Constitution and the Bill of Rights, the prosecution, as well as the accused, must submit to that law.

APPENDIX D

(Statutes Involved)

The Communications Act of 1934 provides in pertinent part (48 Stat. 1103, 47 U.S.C. 605):

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena * issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for

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* As in original.

his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

The Omnibus Crime Control and Safe Streets Act of 1968, provides in pertinent part (82 Stat. 212, 18 U.S.C. 2510-2520):

§ 2510. Definitions.

* * *

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal:

* * *

§ 2511. Interception and disclosure of wire or oral communications prohibited.

Appendix D

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States:

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the

foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

* * *

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the appplication is made, when such interception may provide or has provided evidence of—

> (a) any offense punishable . . . under the following chapters of this title: chapter 37 (relating to espionage). . . .

* * *

Appendix D

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has

been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communica-

tion for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities

characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying

judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

* * *

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter.

The Organized Crime Control Act of 1970 provides in pertinent part (84 Stat. 935, 18 U.S.C. 3504):

Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

* * *

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

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